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MUSINGS ON A FAMOUS LAW REVIEW ARTICLE: THE SHADOW OF SUBSTANCE

*Diane Leenheer Zimmerman**

ALL YEAR, SCHOLARS and practicing lawyers have been gathering to celebrate, and occasionally to ponder why they were celebrating, the hundredth anniversary of the law review article "which launched a tort."¹ Although Samuel Warren and Louis Brandeis's *The Right to Privacy*² is the most famous scholarly endeavor of its kind (at least in the United States), the precise nature of its claim to such fame becomes increasingly unclear with the passing years. The tort those august authors are most clearly and centrally identified with—the disclosure to the public of true but personal information³—has retained just enough life to give it nuisance value and to provide some interesting work for media attorneys. However, even this slim breath of life seems to be failing as many courts refuse to apply the tort or even reject it outright.⁴ While *The Right to Privacy* has fame, does it also have substance?

Professor Leebron takes an unusual and creative approach in exploring the Warren and Brandeis phenomenon in the context of the history of tort theory.⁵ He cogently demonstrates that privacy as Warren and Brandeis conceived it is an anachronism as a mat-

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1. Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?*, 46 TEX. L. REV. 611, 612 (1968).

2. 4 HARV. L. REV. 193 (1890).

3. This tort is described in RESTATEMENT (SECOND) OF TORTS § 652D (1976). Three other forms of behavior are also recognized as tortious invasions of privacy by the *Restatement* and by many states. The first is intrusion, a nontrespassory breach of an individual's reasonable expectation of seclusion, *see id.* § 652B; the second is the so-called "false light" tort where inaccurate information about the plaintiff is publicized, *see id.* § 652E; the third is the misappropriation of a name or likeness for commercial purposes, *see id.* § 652C. This commentary is directed to the private facts branch of the tort.

4. These cases continue to pile up. *See, e.g.,* Hall v. Post, 323 N.C. 259, 372 S.E.2d 711 (1988).

5. Leebron, *The Right to Privacy's Place in the Intellectual History of Tort Law*, 41 CASE W. RES. L. REV. 769 (1991).

ter of tort theory and was so even when they formulated their idea. Professor Leebron notes that Warren and Brandeis's concept was rights-based and plaintiff-centered when the tort law was moving powerfully toward an analysis of liability focused on the fault of the defendant. More specifically, tort law was moving toward a relativistic universe where a defendant's desire to act was tempered by rules of reason rather than being strictly constrained by a plaintiff's absolute right to integrity of the body or property.⁶ In contrast, Warren and Brandeis proposed a tort which, in mathematical terms, is a rather simple equation: right + invasion = liability. While this formula is invariable, its result could be canceled not by a defense of reasonableness but only by the availability of one or another policy-based privilege.

Accepting that Warren and Brandeis lost the battle for theoretical dominance in tort law,⁷ Professor Leebron's discussion nevertheless tempts one interested in the problem of privacy and law to hope for a new lens to view both the law's romance with *The Right to Privacy*, and the substantive failure of the tort it generated. If Leebron's thesis explains why Warren and Brandeis had so little lasting impact on tort theory, does his thesis also explain why their tort has remained problematic?

The prospect is tantalizing, but ultimately the answer is no. Holmes's attempt in *The Common Law*⁸ to unify tort law by basing liability on negligence rather than on the invasion of rights primarily responded to the most common class of mishaps: accidentally inflicted harms to persons and property. Neither Holmes nor negligence theory has been very much concerned with changing the way the law deals with intangible injuries to personhood and identity, or with protecting persons and property from intentional assaults. In this terrain, which focuses on maintaining personal and physical boundaries, rights-based analysis flourishes, as it did in the thinking of Warren and Brandeis. Trespass, assault, false imprisonment, offensive battery, and even defamation⁹ con-

6. See Leebron, *supra* note 5, at 771-72.

7. Negligence has been the basis of modern tort law, at least until the post-World War II resurgence of strict liability in products liability (a phenomenon susceptible to various theoretical interpretations).

8. O.W. HOLMES, *THE COMMON LAW* (1881).

9. At least as formulated before *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), defamation was a strict liability tort. More recently the Supreme Court has hinted that defamation as a true strict liability tort may have survived *New York Times*, absent matters of public concern. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S.

tinue in the tradition of the early writs, retaining a kinship with strict liability and the scent of natural law wafting about them. Although the numbers of cases are few and torts professors tend to view them as intellectually as well as numerically peripheral, these old-fashioned torts continue to serve a largely uncontroversial function.¹⁰ These rights-based actions were not abandoned in the rush to negligence principles, but instead they still function effectively in a way that Warren and Brandeis's private facts tort does not. Why? Clearly, the difference does not depend on which tort theory serves as the basis of these various actions.

Indeed, the privacy tort is not even necessarily premised in rights-based thinking despite the way that Warren and Brandeis chose to make the case for it. To a certain extent, classification is a word game and may be played in numerous ways to achieve similar results. Privacy may easily be reformulated to conform more closely to the Holmesian model, focusing primarily on the defendant's behavior and on the compensatory function rather than on the plaintiff's interest. In essence, this is Dean Prosser's contribution.¹¹ In Prosser's, and subsequently, the *Restatement (Second) of Torts*,¹² view, the law actually permits defendants to invade another's "privacy" if they do so reasonably; the behavior becomes tortious only if the information disclosed would be highly offensive by community standards.¹³ Furthermore, victims are compensated not for a violation of an abstract right, but for their emotional distress.¹⁴ While Prosser's modernization gave courts a new shared language with which to discuss "privacy," this formulation was unsuccessful at breathing life into this languishing body of law. Reasonableness and offensiveness remain as elusive as Warren and Brandeis's original distinction between public and private. The problems with privacy as a tort seem to remain problems whether it is clothed in ancient or in modern dress.

749, 755-63 (1989).

10. The controversy that does exist is often generated by conflicts with first amendment values. For example, this conflict has led courts to remake large parts of defamation law. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (recovery by public officials for defamation limited to instances of knowing falsehood or reckless disregard for truth). Similar conflicts arise in the tort of intentional infliction of emotional distress. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (recovery by public officials limited to instances of false statements of fact made with actual malice).

11. See Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

12. RESTATEMENT (SECOND) OF TORTS §§ 652A, 652B, 652D (1976).

13. See Prosser, *supra* note 11, at 396-97.

14. See *id.* at 409.

Privacy as a tort remains problematic because torts work well only when fairly broad-based and particularized agreement exists about what society wishes to protect, deter, and compensate plaintiffs for. Tort law fails when there is disagreement on these issues. This society is comfortable with protecting bodily integrity, with the notion that reputation is a valuable good, and with the idea that property owners have a largely unassailable interest in exclusive control. Whether the underlying interest is protected with a rule of reason or strict liability, members of our society believe the underlying values are important to themselves as individuals and are equally willing to defend them when others' interests are infringed. Furthermore, judges and juries share a reasonably consistent understanding of these values.

In contrast, privacy is not so well-defined. Like a flag which has not been assigned a country, privacy is rich in symbolic value but has little particularized meaning. There is sparse evidence that our society shares Warren and Brandeis's core assertion that information about an individual's life "belongs" to that individual and cannot be used by others without the individual's consent.¹⁵ This does not mean that people would not prefer to have control over the circles where information about themselves circulates; rather, it means that they are uncertain about their willingness in the long-term to support that right for other people. In a complex society, individuals value some forms of privacy highly. However, it is not clear that one of these forms is the right of our fellow citizens to be free from publicity about details of their personal lives, obtained in a legal, nonsurreptitious way. Indeed, people both desire and legitimately need a wide variety of information about others.¹⁶ Information serves many functions for people both individually and collectively, some of which cannot be predicted *ex ante*. It is difficult to achieve stable and serious agreement on the sort of personal information that can readily be foregone, and which disclosures are therefore "unreasonable." Although this problem often arises in the form of a conflict with first amendment values, the problem would exist and marginalize this tort even if there were no Bill of Rights. In addition to time and

15. Warren & Brandeis, *supra* note 2, at 195-96, 205-06.

16. Many have studied the importance of gossip. For examples of these studies and a discussion of the importance and persistence of gossip, see Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 332-37 (1983).

money, courts expend credibility in administering the tort system if they deter behavior that many would prefer to encourage and do so to protect interests that, in particular cases as opposed to abstract theory, will surely strike many people as marginal. The ultimate conclusion may be that this is a misconceived body of law.

Perhaps this point is best illustrated by examining the ways in which the law has successfully protected some aspects of privacy. Trespass, for example, does not merely protect existing allocations of wealth, but it also stabilizes physical boundaries behind which people are free to conduct their lives unobserved, or at least only selectively observed. It is not surprising, therefore, that one of the law's most workable and least controversial branches specifically denominated as protecting privacy is the branch barring non-physical intrusions into seclusion. This tort shares a clear intellectual kinship with the values underlying the tort of trespass. This interest is effectively protected because society agrees that people are entitled to establish protected spaces; society does not have to make controversial value judgments about the desirability (or lack of it) of shielding each particular activity the individual may engage in behind those boundaries with a tort action. Similarly, commercial uses of personal information, with its overtones of economic injury, have won a far firmer place in common law jurisprudence than uses of personal information generally.¹⁷ Prevention of unjust enrichment is also a well accepted legal objective, and courts do not perceive this form of privacy protection as requiring elusive judgments about the value of information.

By contrast, it seems difficult to give convincing content to the values underlying the private facts tort action regardless of how it is conceptualized as a matter of tort theory. This makes it hard to give the tort an enduring place in our jurisprudence.

Despite the intellectual affinity of Warren and Brandeis's rights-based analysis to constitutional analysis, some of the same weaknesses afflicting their concept as a tort have also kept it from playing a meaningful role in the context of constitutionally-based privacy as well. Professor Leebron specifies numerous instances where both the Supreme Court of the United States and state courts have explicitly referred to the constitutional dimensions of

17. This includes the privacy tort of appropriation of names or likenesses for commercial purposes, and the newer, related right of publicity.

Warren and Brandeis's right to privacy.¹⁸ However, the article's contribution in this area has been rhetorical rather than substantive. The notion that judges in constitutional cases do not always mean what they seem to say when quoting from *The Right to Privacy* is readily apparent from the result of the collision of Warren and Brandeis's conception of privacy with a right actually written into the Constitution. Plaintiffs lose.¹⁹ It is difficult to argue, as a constitutional matter, that protection against publication of ill-defined "private" facts, causing entirely intangible harms, should outweigh for example a defendant's right to publish material acquired through personal observation or other fair means.

Professor Leebron notes that the Supreme Court stopped citing Warren and Brandeis in constitutional privacy cases after 1967.²⁰ This is hardly surprising since the article is essentially irrelevant to the issues posed.

Constitutional privacy and the right to protect private information have little in common. First, only occasionally do constitutional privacy claims directly concern the distribution of information. Instead they often concern bodily integrity, the sanctity of nonpublic places, or the ability to make intimate decisions without regulation. Furthermore, the core issue in cases decided on constitutional grounds is the allocation of power within our system of government in disputes pitting claims of individual autonomy against assertions of legitimate government interests. The objective is a stable accommodation of both interests by enunciating clear limits on the government's coercive force. Government cannot invade our homes without cause and adequate procedural protections; it cannot command our speech; and it has only limited power to interfere with our religious practices and procreative choices. Beyond the contribution of a felicitous phrase or two, it is difficult to see what the Warren and Brandeis article can contribute to the maintenance of this balance. Thus, we are left with the same question with which we started. Why are we still discussing this tort and this law review article one hundred years later, if it has had so little solid effect on our jurisprudence?

18. Leebron, *supra* note 5, at 802-07.

19. *See, e.g., Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (first amendment right prevails); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 323, 469 (1975) (same); *cf. Time, Inc. v. Hill*, 385 U.S. 374 (1967) (limiting actions for false light invasions of privacy to instances involving knowing or reckless falsity).

20. Leebron, *supra* note 5, at 806.

There are good reasons, although these reasons are not ones that the law is especially well-equipped to address. Warren and Brandeis remain with us because they suggested, probably incorrectly, that the dilemma inevitably created by participation in any community can be resolved. Humans want to maintain boundaries between themselves and others. However, we cannot maintain absolute control of identity and information unless we are willing, as few are, to endure the pain of total isolation or we can limit the information's escape by obtaining a veto over the autonomy of the knower. Realistically, communities are unwilling to provide such a veto in more than token form, if at all, since the exchange of information is crucial to the cohesiveness of the community and to the full development of all its members. The desire for privacy is a wish for a room of one's own, but almost inevitably this room is simultaneously too large and too small for comfortable habitation.

The august authors of *The Right to Privacy* have provided us with an object lesson about the limits of the law in solving social problems. At best, the law can guard the periphery, the four walls. However, the law cannot resolve the inherent central tension and should not continue to try. If Warren and Brandeis's article is still being discussed at the end of another century, the discussion should be led by psychologists, sociologists, and moral philosophers. We lawyers should be content to sit in the audience for that anniversary celebration.

